

THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF

The complaint made by Mr. Walter Hyman of Toronto,
Ontario, alleging discrimination in employment and
reprisal by the Southam Murray Printing, 2973 Weston
Road, Weston, Ontario

AND IN THE MATTER OF

The complaint made by Mr. Walter Hyman of Toronto,
Ontario, alleging discrimination in employment and
reprisal by the International Brotherhood of Teamsters
Local 419, 1194 Matheson Blvd., Mississauga, Ontario

A HEARING BEFORE:

Professor John D. McCamus
Appointed a Board of Inquiry into the above
matters by the Minister of Labour, The
Hon. Robert Elgie, to hear and decide
the above mentioned complaints.

APPEARANCES:

Mr. A.C. Millward	
Mr. D.A.J. D'Oliveira,	Counsel for the Ontario Human
	Rights Commission and
	Mr. Walter Hyman
Mr. R. Dunsmore,	Counsel for South Murray Printing
Mr. D.J. Wray,	Counsel for International Brother-
	hood of Teamsters, Local 419

FINAL DECISION

I. Introduction

The proceedings before this Board of Inquiry concerned a complaint made by Mr. Walter Hyman against his former employer, Southam Murray Printing, and against the Union, the International Brotherhood of Teamsters, Local 419, which represented him in various disputes with the respondent employer up to and including the dispute which arose from his dismissal by Southam Murray in September of 1978.

The complaint against the employer, made on November 21, 1979 (Exhibit 5), after setting forth certain factual allegations concerning the complainant's employment relationship with the respondent alleges, in essence, that various acts of discipline and his ultimate dismissal constitute breaches of Section 4(1)(b) (g) of the Ontario Human Rights Code. Those provisions stipulate as follows:

- 4(1) No person shall,
 - ... (b) dismiss or refuse to employ or continue to employ any person;
 - ... (g) discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.

As well, the complaint alleges that to the extent that the complained against events occurred after July 19th, 1977, they resulted from the fact that the complainant had by then filed an initial complaint (Exhibit 3), dated July 19, 1977, concerning the actions of the

employer and thus amounted, in some sense, to retaliation for the taking of this initial complaint. This was alleged to be a contravention of provisions of the Code proscribing employers from penalizing in any way employees who make such complaints or assist in their prosecution.

It should be noted that the second of the two complaints (Exhibit 5) substantially repeats the allegations made in the initial complaint and appears to constitute the principal subject matter of the appointment of this tribunal.

The complaint made against the respondent Union (Exhibit 6), dated November 21, 1979, sets forth certain factual allegations concerning incidents giving rise to discipline and what is alleged to be inadequate handling of these matters by representatives of the Union. This conduct is also alleged to constitute a contravention of Section 4(1)(b) and (g) of the Code, reproduced above. This complaint is also the second of two complaints made against this particular respondent. And, again, it is alleged in the second complaint that discriminatory conduct subsequent to July 19th, 1977, resulted from the fact that an initial complaint (Exhibit 4) dated February 8, 1978 had been filed by the complainant against the respondent Union. This was also alleged to constitute a contravention of the provisions proscribing harassment of individuals who have made or participated in the processing of complaints under the Code.

As with the complaints against the employer, the second complaint substantially repeats the allegations of the first and appears to constitute the subject-matter of the appointment at the Tribunal.

III. Preliminary Objections and Interim Orders:

A variety of preliminary objections were raised before this Board of Inquiry by the Respondents, including an objection to the procedure proposed by this Board of Inquiry of hearing these complaints together in the course of one set of hearings. The preliminary objections were all dismissed and formed the subject matter of a Decision on Preliminary Objections, since reported at (1982) 3 C.H.R.R. D/617. Two further matters of an interim nature were raised before and decided by this tribunal. The first was a successful application by the respondents to have the hearing bifurcated into an initial set of hearings dealing with the merits of the dispute and a second set of hearings which would deal with quantum of relief, should the complainant enjoy success in the initial set of hearings. The reasons of the Board of Inquiry for granting this motion have since been reported at (1982) 3 C.H.R.F.D/680. The second matter of an interim nature, although it was subject to a decision by the Board of Inquiry at the appropriate time, requires a brief discussion in the context of this final decision.

The need for a decision on a second interim matter arose in the following circumstances. Counsel for the respondent employer, having just commenced his cross-examination of the complainant Hyman, invited the tribunal, in turn, to invite the complainant to absent himself from the hearing room so that certain matters might be discussed. That invitation was extended and the complainant left the hearing room. Counsel then proposed that he be allowed an exemption from an order previously made by the tribunal excluding witnesses, to permit the attendance of a

psychiatrist retained by the respondent employer. It was counsel's view that the making of such an exception for an expert witness was not unusual. As well, it was his view that, inasmuch as cross-examination had commenced, counsel for the complainant could not communicate to the complainant the identity of the expert witness and the purpose for which he was in attendance. It was the intention of counsel for the employer that the psychiatrist in question would attempt to make a psychiatric assessment of the complainant, on the basis of evidence given in these proceedings, which might be material to the issues before this Board of Inquiry. It was his view that if the complainant were to be aware of the attendance of the psychiatrist, this might have a distorting effect on the evidence of the complainant and would diminish the value of the ultimate opinion of the expert witness.

Counsel for the complainant objected strenuously to this proposed course of action and, in particular, argued that if a psychiatrist was to be permitted to attend the hearing, they must in turn be permitted to so advise the complainant and seek instructions from him. Counsel for the employer responded that this would constitute a breach of Rule 8(15)(d) which provides that:

"During cross-examination by an opposing lawyer; while his witness is under cross-examination the lawyer ought not to have any conversation with him respecting his evidence or relative to any issue in the proceeding."

The proceedings were adjourned to permit counsel to prepare argument on this point and reconvened for a special hearing on this matter. In the interim, counsel for the complainant sought the advice of the Law Society of Upper Canada as to whether or not a conversation with their client in these circumstances would indeed constitute a contravention of Rule 8 of the Rules of

Professional Conduct. The opinion communicated by the Society to counsel was that the matter lay in the discretion of the tribunal in question and noted particularly that Rule 8 concludes that:

"If the lawyer questions whether his conduct may be in violation of a rule of conduct or professional etiquette, often it will be appropriate to obtain the consent of the opposing lawyer and leave of the court before engaging in conversations that may be considered improper or a breach of etiquette".

Subsequent to the hearing in which argument on this matter was entertained, this Board of Inquiry communicated its decision to counsel to the general effect that if the attendance of the psychiatrist were to be permitted, counsel for the complainant would be allowed to communicate this fact to the complainant and seek instructions from him with respect to the question, for example, as to whether they should in turn retain the services of a psychiatrist. Upon reconvening the hearing, it was suggested that the reasons for this decision might be included in the final decision of this tribunal. Those reasons, briefly stated, are as follows.

What was envisaged by counsel for the respondent employer was, in effect, a surreptitious psychiatric examination of a party to the complaint on the basis of evidence given in the witness stand during these proceedings. It is my view that to permit such procedure would be offensive to basic principles of natural justice and to the basic dignity and civil liberty of the complainant. Although parallels were drawn to the capacity of the criminal courts to

require the conduct of psychiatric examinations, it must be noted that in that context the accused person will be fully informed as to the nature and purpose of the examination in question and will be aware that it is being conducted. The procedure proposed by the respondent employer does not embody similar safeguards of the rights of the subject of the examination. Moreover, it appears to be established law that parties, in contrast to witnesses, are entitled to attend proceedings to which they are a party. Authority for this proposition cited by counsel for the complainant includes: Selfe v. Isaacson (1859), 1 F.N.F. 194; Bird v. Vieth (1899), 7 B.C.R. 31; and McIntyre v. McIntyre [1925] 2 W.W.R. 581 (B.C.S.C.).

It is not necessary to belabour the obvious rationale for a rule which permits parties to be present at proceedings affecting their rights and obligations. It may be said, however, that the rationale is especially compelling in the context of proceedings under the Human Rights Code. There would be considerable irony in conducting proceedings under the Code in such a way as to leave one or another of the parties with some basis for feeling that their basic rights and freedoms have been abused by the manner in which the proceedings were conducted. Proceedings under the Code should not be converted, behind the back and without the knowledge of the complainant, into what would amount to virtually a public psychiatric examination.

Subsequent to the communication of this ruling to the parties, counsel for the respondent employer and the complainant indicated that after some consultation, they had resolved that neither would seek an exemption from

the general ban on the attendance of potential witnesses at these proceedings.

III. An Overview of the Chronology of Events and Complaints:

Before turning to a more detailed consideration of the evidence pertaining to the various incidents which formed the subject matter of the complaints considered in these proceedings, it will be useful to set out a brief chronology of the principal events and the principal allegations concerning them set forth in the complaints themselves.

In September of 1973, the complainant began work for the respondent employer as a Porter in the bindery area of a printing plant operated by the respondent. The principal, though far from the only, task assigned to Porters is to supply materials to the operators of various machines involved in the binding process and remove completed work.

The first major incident concerned a dispute between the complainant and a fellow Porter, Mr. Frank Laposta, concerning the use of a hand truck. The dispute arose on June 23rd, 1977. The complainant feeling that he had been unfairly treated by Mr. Laposta, complained to Mr. Herb O'Connor, the Plant Superintendent. Subsequently a meeting was convened involving both Mr. Laposta and Mr. Hyman with the ultimate result that both men were issued a letter of warning (Exhibit 7 and 8), although it would appear to have been Mr. Hyman's impression at the time that only he

had received such a letter.

On July 8th, 1977, Mr. Hyman filed a grievance (Exhibit 9) seeking withdrawal of the aforementioned letter. This grievance was handled on behalf of the union by one of the shop stewards, Mr. Jim King, who eventually "signed-off" the grievance, that is, agreed with the employer not to pursue the grievance, without either the knowledge or the consent of the complainant.

Shortly thereafter, on July 19th, the complainant filed the first complaint against the respondent employer (Exhibit 3) under the Ontario Human Rights Code. The complaint recounts the history of the complainant's relationship with Mr. Laposta, culminating in the June 23rd incident, and the receipt by the complainant of a written warning. As well, the complaint states that the complainant was "always expected to do more than one person's work" and suggests that "the company is trying to get rid of me". His conduct was alleged to constitute a contravention of those provisions of Section 4 of the Code previously quoted in this decision. This complaint was investigated by the Commission and one of the elements in the complaint eventually made against the respondent union is that its officials were not sufficiently cooperative in this investigation.

In the late summer of 1977, Mr. Hyman approached the President of the respondent union, Mr. Bud Bodkin, to complain about the handling of his grievance. There followed from this a series of meetings concerning the whole matter with company

officials, initiated by Mr. Bodkin, one in late summer, one in late October and eventually, one on January 16th of 1978 at which the respondent employer agreed to withdraw the letters of warning issued to both the complainant and Mr. Laposta.

Prior to the January 16th meeting, another serious incident occurred. In mid-December, it was alleged that Mr. Hyman had refused an order to either assemble cardboard boxes or pile them in appropriate fashion. This resulted in a further letter of warning (Exhibit 16) coupled with a two-day suspension from work, effective December 21st and December 22nd. This, in turn, resulted in a further grievance filed by Mr. Hyman (Exhibit 17) which became the subject of discussion between the union and company officials on January 16th, 1978. At that meeting, the respondent employer agreed to reduce the two-day suspension to one day. As well, the company agreed to return the complainant to the afternoon shift from the day shift in accord with his own preference to do so.

On February 8th, 1978, the complainant filed his first complaint (Exhibit 4) against the respondent union under the Ontario Human Rights Code. That complaint provides an account of the initial dispute with Mr. Laposta, the resultant letter of warning, the grievance relating to the letter of warning and the handling of the grievance by the union. As well, the complainant alleges that the union failed to cooperate with the Commission's investigation of the initial complaint filed

against the respondent employer (Exhibit 3). The complainant concludes the complaint by describing himself as a black Jamaican man and alleging that the conduct of the respondent union was discriminatory in nature and constitutes a contravention of the Ontario Human Rights Code.

The next incident of major significance to these proceedings is a dispute which occurred on September 12th, 1978 with respect to the complainant's alleged unwillingness to undertake a particular work assignment. A "baler" machine had broken down with the result that scraps of paper had fallen onto the shop floor. Although the complainant's grounds for refusing to undertake this assignment are to some extent in dispute, it is common ground among the parties that he did refuse to do so. This resulted in further disciplinary action by the respondent employer. Mr. O'Connor advised the complainant by a letter dated September 14, 1978 (Exhibit 19) that a three-day suspension, effective September 14, 15, and 18th would be imposed for this refusal to follow instructions. The letter also mentioned that when he refused to undertake the assignment, the complainant used language which was "very abusive and profane". The complainant filed a grievance with the respondent union concerning this suspension.

It was the complainant's position that he had a valid medical excuse for refusing to accept the work assignment. When he returned to work, he brought with him a medical certificate from his doctor which requested "light duties". In the event, the "light duties" which were assigned to the complainant and which, it is alleged,

he agreed to undertake for a two-week period, involved cleaning washrooms. The complainant was unhappy with this assignment, though the reasons for his unhappiness are disputed, and ultimately, on September 29th, ironically the last day on which he was to carry out this assignment, he refused to complete the day's work. The complainant had protested that he was allergic to some or all of the chemicals which he was required to use in this assignment. After a visit to the company doctor on the 29th, the respondent employer's officials were advised that there was no evidence of any such problem and they therefore require him to return to complete the assignment. The complainant refused to do so, though again the circumstances on which he did so are to some extent in dispute, and in response, the respondent employer decided to terminate his employment, a decision communicated to him in writing by Mr. DiRosa the Manager, Plant Services, on October 2nd, 1978 (Exhibit 22). The complainant filed a grievance with respect to his dismissal (Exhibit 23) and eventually, this grievance, together with the grievance concerning the three-day suspension, were submitted to arbitration pursuant to the provisions of the Collective Agreement governing the relationship of the respondent employer and the respondent union. Just prior to the incident on September 29th, culminating a dismissal, the complainant filed a further grievance in which he asked "why have I (been) demoted from the bindery" (Exhibit 29). The respondent employer responded to this grievance by noting, in effect, that the move was not a

demotion but rather a temporary move responding to the request for light duties. This was accepted by the respondent union on October 2nd, 1978 as a satisfactory settlement of this grievance.

The arbitration panel established to hear the other grievances rendered decision on July 3rd, 1979. In its decision (Exhibit 12), the Board reviewed the evidence presented to it and concluded that both grievances should be denied. With respect to the three-day suspension, the Board considered "the totality of the grievor's conduct on this occasion as just cause for discipline" (at p. 5). With respect to the dismissal, the Board concluded that it "did not accept the grievor's story about his alleged allergic reaction" (at p. 9) and, in light of his prior work record, declined to intervene and exercise the Board's discretion to substitute a lessor penalty than dismissal.

Finally, on November 21st, 1979, the two complaints which are the subject matter of these proceedings were filed with the Ontario Human Rights Commission. The complaint against the respondent employer (Exhibit 5) offers an account, from the complainant's perspective, of his employment history with the respondent, including the incidents relating to Mr. Laposta, the two-day suspension, the three-day suspension and the ultimate dismissal. With respect to the latter, the complaint states:

"For two weeks I worked at this cleaning job all the time telling the nurse and John DiRosa I was allergic to the cleaning materials. On September 29th, 1978, I was sent to the company's doctor who looked at the rash I had on my hands and without making any tests told me nothing was wrong.

I was sent home and again on Ray King's advice was to obtain a doctor's certificate. On Saturday, September 30th, 1978, I went in to work as usual to work with the crew doing T.V. guides. When I got there the Plant Security told me they had orders not to let me in."

The complaint goes on to allege that "all the harrassment I was given is discrimination in employment", contrary to the Code and that those incidents occurring after July 19th, 1977 occurred because of the original complaint concerning the respondent employer filed on July 19th, 1977 (Exhibit 3).

The complaint filed on November 21st, 1979 with respect to the respondent employer (Exhibit 6) reviews, from the complainant's perspective, the history of the respondent union's handling of the grievances concerning the Laposta incident, the two-day suspension, the alleged uncooperativeness of the respondent's officials in the context of the investigation of the complainant's July 19th, 1977 complaint against the respondent employer, and, finally, the respondent union's handling of the grievances relating to his ultimate dismissal.

With respect to the latter point, the complaint states:

"Although I requested that in their defence of me reference be made to my several and continuous complaints of discrimination. This was not done and in fact, the union allowed the warning letter

which was to have been removed from my file to be used against me at the hearing. In my view the union's lawyer defended the union and not me."

As well, the complaint states that the complainant had not yet received a copy of the decision of the arbitration board and that the union is not making any effort to get a ruling. The complaint concludes by alleging that the foregoing conduct constitutes a contravention of the Code, including the provisions relating to the intimidation of individuals who have filed complaints or otherwise cooperate in the handling of complaints under the Ontario Human Rights Code.

Against the background of this chronology of events, it is necessary to embark on a more detailed consideration of the elements relating to the more important incidents discussed in these proceedings. In doing so, it is important to note, however, that the issues before this Board of Inquiry are rather different from those before the Board of Arbitration which reviewed the grievances pertaining to the complainant's dismissal. The concerns of the Board of Arbitration are simply whether the alleged misconduct occurred and, if so, whether the penalty imposed by the employer is an appropriate one. The concerns before this Board of Inquiry, however, are not whether or not alleged misconduct occurred or whether the sanctions were imposed where appropriate but rather, whether officials imposing such sanctions were acting on the basis of the kinds of discriminatory attitudes proscribed by the Human

Rights Code. Thus, even if it were the case that certain alleged misconduct did not occur or that certain sanctions imposed were unduly harsh or that the handling of grievances by trade union officials was inadequate for some reason, the complaints must still be dismissed unless it has been established, on the balance of probabilities, that discriminatory attitudes played a role in the decision-making of either of the respondents.

IV. The LaPosta Incident:

From the time the complainant Hyman began working for the respondent employer in September of 1973 until June of 1977, his relationship with his employer appeared to be relatively trouble-free. Although warnings were issued to him with respect to absenteeism (Exhibits 85 and 86) in 1975 and 1976, most of the supervisory personnel who testified in these proceedings were prepared to characterize Mr. Hyman as a good worker. Though an exception was Mr. Cook, his foreman from January 1976 to May 1977 who said that although he would not describe Mr. Hyman as a good worker, he did in fact do what he was asked to do.

For his part, however, the complainant identifies two problematic aspects of his employment. He mentioned in his complaint, and repeated in testimony, his feeling that he was always or commonly asked to do the work of two or three men by his supervisors. It must be said that there has been no evidence of a corroborative nature with respect to the existence of general practices of this kind. Many of those who supervised Mr. Hyman's

work during this period did testify and denied that this had occurred. If it had occurred, it is rather surprising that no witnesses could be brought forward to provide their own observations of this.

A second concern identified that by the complainant both in his complaint and in his testimony is that from a very early stage in his employment, he was harrassed by a fellow worker and porter, Mr. Frank LaPosta. It is common ground among the parties that infact Mr. Hyman and Mr. LaPosta had a very troublesome relationship, punctuated frequently by disagreements on various matters. While Mr. Cook served as Mr. Hyman's foreman, Hyman complained to him about LaPosta's behaviour. Cook testified at these proceedings and indicated that he spoke to LaPosta about this and that he thought the problem had been resolved. Mr. Hyman's perception, however, was that no significant change in Mr. LaPosta's conduct resulted from Cook's intervention. It is important to note, however, that the present Inquiry, Mr. Hyman testify that he did not believe that LaPosta was harrassing him as a result of discriminatory attitudes. Although he did not offer any explanation for LaPosta's conduct, he described it as one of harrassment and "sabbatoging" his efforts. The substance of his complaint against the respondent employer with respect to his relationship with Mr. LaPosta is that the respondent did not do enough to resolve this difficulty and failed to do so because of discriminatory attitudes.

These matters came to a head in an incident occurring on June 23rd, 1977. Although there is considerable disagreement among the witnesses and among the parties as to precisely what happened on this occasion, certain facts are reasonably well established. First, it is clear that prior to the incident in question, Mr. Hyman was working on a bunn-tying machine. He was unable to keep up with the work involved and was therefore moved by Mr. Mike Anderson, the foreman to porter on another machine which the operator was Mr. C. Massa. Sometime thereafter, Hyman and LaPosta got into a dispute over the use of a hand truck. There is disagreement in the evidence, however, with respect to the reasons for moving Hyman to a new job and with respect to the substance of the dispute between Hyman and LaPosta.

The complainant testified that he needed a hand truck located in the aisle between the machines where Hyman and LaPosta were respectively working, that he needed the truck only for a minute or two to move a skid and that LaPosta refused to let him have it. Although almost all other witnesses suggested that the hand truck was under a skid on which Mr. LaPosta was working, but the substance of the matter, i.e. that LaPosta refused to allow Hyman access to a hand truck, is corroborated by others. On cross-examination, however, Hyman further testified that when LaPosta refused to give him the hand truck, he did not argue the point. He testified that he left quietly, indicating that there was not any time to argue and not raising his voice. He simply went and got another truck. I do not accept this evidence. Even

those witnesses who were supportive of Mr. Hyman's position with respect to this dispute, Mr. Massa and Mr. LaPointe, the latter of whom replaced Mr. Hyman on the bunn-tying machine, indicated that Hyman and LaPosta had a significant quarrel over the issue and that voices were raised. Massa testified, and LaPointe testified to the same effect, that eventually he, Massa, intervened and instructed LaPosta to give the truck in question to Hyman and that LaPosta did so.

It was the evidence of Dick Anderson, the foreman, that he had moved Hyman because he did not appear to be trying to keep up with the load on the bunn-tying machine and that it was for this reason he replaced him with LaPointe. LaPointe, on the other hand, was sympathetic to Hyman's concern and testified that when he did take over he found it necessary to secure LaPosta's help with the labelling aspect of this operation. If LaPointe's evidence can be accepted, this would be the only instance with respect to which it could be argued that Hyman was saddled with an unduly burdensome task.

LaPointe and Massa are also supportive of Hyman's perception that he was being unfairly treated by LaPosta in this context. Both of them indicated that Hyman needed the truck and that LaPosta could afford to spare it for the time in question without interfering with his own work.

In the event, Hyman determined to complain about this episode to Mr. Herb O'Connor, the Plant Supervisor on this afternoon shift and did so. In response to this overture, Mr. O'Connor wrote a memorandum (Exhibit 81) to Mr. Reuben Earle, the Foreman of the day shift (personnel matters being the responsibility of the day shift) in the following terms:-

Reuben:

"Walter Hyman was in to see me tonite and wishes to lodge a formal grievance against Frank LaPosta.

He claims Frank has been sabotaging him on his work for sometime and he isn't going to put up with it.

Walter was upset when Dick Anderson took him off bunn tying and put Chester on because Walter wasn't keeping up with the machine. He said he was being discriminated against.

I have heard several different stories on different instances so they should be confronted by each other with the union rep. and Dick Anderson present.

I don't think it's necessary for me to be present but I will co-operate in any way possible."

Herb.

It is of interest to note that Mr. O'Connor indicates in this memorandum, as he did in his testimony, that the meeting was in part related to a series of incidents of this kind and not simply restricted to the June 23rd episode. Such a meeting was ultimately organized and attended by Mr. Earle, Mr. Anderson, Mr. John DiRosa, at this time the Manager, Plant Services, Mr. O'Connor, Mr. Hyman and Mr. LaPosta. Messrs. O'Connor, Anderson

DiRosa and Hyman all testified with respect to the occurrences at this meeting. Although accounts of the meeting vary somewhat, I accept the evidence of Anderson, O'Connor and DiRosa to the general effect that the meeting degenerated into something of a shouting match between LaPosta and Hyman. Although it did not clearly emerge from the evidence what LaPosta's side of this story might have been, it is at least apparent that it was vociferously stated by him and violently disagreed with by Mr. Hyman. It is also apparent that Mr. Anderson was inclined to side with Mr. LaPosta to some extent. Mr. DiRosa testified that LaPosta indicated at the meeting that he was under a direct order from his operator not to give up the hand truck. Mr. O'Connor testified that he thought Anderson himself told LaPosta to use the truck for another purpose and Mr. Anderson, in turn, said that his reaction was that Frank was within his rights in refusing to turn the hand truck over to Hyman. Whatever their views on the respective merits of the two sides of the dispute, however, the group ultimately resolved that warnings should be issued to both parties in an attempt to get them to work together without further disagreements of this kind. Of the two men, it would appear that Mr. LaPosta was able to create the impression, at least, of being less emotional than Mr. Hyman. Although Mr. Hyman denied that this occurred, I accept the evidence of Anderson, O'Connor and DiRosa that Hyman accused Anderson of discriminating against him and called him a "racist liar" and that at one point during the meeting, according to the evidence of Anderson and DiRosa, that Hyman stated that the earth will open up and all the white people

will fall into a pit and that black people will be in the trees. Anderson testified that Hyman as well said something to the effect that "we are taking our orders from Haile Selassie".

For his part, Mr. LaPosta ultimately offered to shake hands with Mr. Hyman, an offer which was refused. Whether Mr. LaPosta did so as a sincere gesture of reconciliation or rather as an artful attempt to increase his credibility with his superiors is not something revealed in the evidence.

The general question of the reliability of the complainant's testimony is an issue to which it will be necessary to return. At this point, it is sufficient to note that a number of conceivable reconstructions of these events emerge from the totality of the evidence relating to this meeting but the most likely one appears to me to be that in the face of conflicting arguments from Mr. LaPosta and Mr. Hyman and against the background of a history of disagreements of one kind or another, company officials concluded that the most appropriate solution was to not inquire further into the specifics of the matter but to simply discipline both parties. I am confident, in any event, that the complainant and the Commission have not discharged their burden to demonstrate that the decision to discipline was motivated by attitudes of racial discrimination.

Having reached this conclusion, however, it may also be noted that it is entirely conceivable that Mr. Hyman was unfairly

treated by Mr. LaPosta in this particular incident. Certainly the evidence of Massa and LaPointe offer support for this view and, if this is so, it is not surprising that the June 23rd episode and the subsequent meeting was an intensely frustrating situation for Mr. Hyman.

V. Aftermath of the LaPosta Incident:

The complainant was obviously very disappointed by the outcome of his complaint to management about the conduct of Mr. LaPosta. Mr. Hyman sought to enlist the assistance of the respondent union and filed a grievance with one of the shop stewards, Mr. Jim King. The handling of this grievance by Mr. King and by the responsible union officials constitutes a significant element in the complainant's case against the respondent union.

The substance of Mr. Hyman's concerns about the conduct of Mr. King are easily stated. Mr. King, without engaging in a substantial investigation of the matter and, more particularly, without discussing the matter further with Mr. Hyman, "signed-off" or agreed to settle or withdraw the grievance. It is no surprise that Mr. Hyman saw this as inadequate representation by Mr. King and that he lodged a complaint concerning King's conduct with Mr. Bud Bodkin, the President of the respondent union.

Mr. King's explanation for his conduct was the following. Mr. King was away on holiday when the incident occurred on the 23rd and, in any event, was working on day shift, rather than the afternoon shift on which Mr. Hyman was employed and accordingly

had no direct knowledge of the incident itself. When he returned from holiday and assisted Mr. Hyman in filing a grievance concerning the letter of warning he had received, it was Mr. King's impression that Mr. Hyman had alone received a letter of warning relating to the incident. This struck him as unfair inasmuch he was himself aware of the fact that LaPosta and Hyman had had many disputes in the past, often concerning the use of hand trucks. It was King's stated opinion that "you don't get a letter for one day" and his assumption therefore that the letter related in part at least to the history of the relationship of the two men. The employer's response to the grievance (stated on p. 2 of Exhibit 18) was, in part, that "due to the fact that an identical letter was given to Frank LaPosta for his part in the incident plainly shows that no injustice was intended". Upon learning that both men had received letters of warning, it was Mr. King's view that the employer's position was defensible and that the grievance would not succeed.

King's explanation for not discussing the matter with Hyman is that he waited for him at the end of the day shift in order to have a discussion with him. Mr. Hyman was late for the afternoon shift, however, and, inasmuch as King was confident that he could explain the employer's position to him, he felt that it was appropriate to sign off the grievance without waiting further. Mr. King testified that he had signed off a grievance without discussion with the grievor on at least one previous occasion and that the grievor in the other instance was a Caucasian.

Apparently two signatures are required to sign off a grievance. The second shop steward to sign was Mr. Ralph Sly. Mr. Sly offered a slightly different explanation of his willingness to sign it off. Although he too thought that the employers' handling of the matter was not unfair inasmuch as both LaPosta and Hyman received warnings, he was also concerned that the two men had gone to a meeting with company officials without a shop steward present. Mr. Sly was not otherwise involved in handling the grievance, however. As he too was on the day shift, he had no direct knowledge of the incident. He did, however, speak to Mr. Earle and Mr. DiRosa and indicated to them that he felt it was inappropriate for the company to involve itself in this matter. He thought it would be more appropriately dealt with as a matter of internal union dispute resolution. If two members of the union are not getting along with each other, it would be more appropriate, in Sly's view, for them not to involve the employer in trying to sort out their difficulties but to keep it within the union context.

Although plausible explanations have thus been offered both by Mr. Jim King and Mr. Ralph Sly for their decision to sign off the grievance, the three stewards concede that it was improper to do so. When Mr. Hyman drew his concerns to the attention of Mr. Bodkin as President of the union, Mr. Bodkin indicated that he thought that it was highly improper for stewards to sign off grievances without consulting with the grievor and he undertook to do something about Mr. Hyman's problem. Pursuant to this undertaking, Mr. Bodkin then initiated a series of meetings with company officials and

ultimately, on January 16th, 1978, was instrumental in securing a withdrawal of the letter of warning in question. The complainant Hyman remains concerned, however, that the investigation undertaken on Bodkin's initiative was not done thoroughly and that the January 16th settlement was, with respect to other matters then on the table, an unfair one. These inadequacies, from his perspective, of the union's response to his problem he attributes to discriminatory attitudes on the part of the shop stewards and other union officials. Accordingly, it is necessary to examine the actions of the union in some detail.

Evidence relating to the meetings initiated by Mr. Bodkin was provided by Mr. Bodkin himself and by many others both from the company and from the union, including Mr. Hyman. At the first meeting, Mr. Bodkin reprimanded Jim King for settling a grievance without the consent of the grievor and clearly indicated that the practice was improper. The main business of the meeting, however, involved a discussion with both Mr. LaPosta and Mr. Hyman. Mr. Bodkin testified that much of the meeting was taken up by a very heated exchange between LaPosta and Hyman and the meeting eventually broke up inconclusively. Mr. Hyman had insisted that he should have an opportunity to bring witnesses to meet with this group and accordingly, a further meeting was scheduled. Although it was Mr. Hyman's view that he was not afforded a fair opportunity to bring witnesses to the second meeting, it would appear that, apart from scheduling a meeting for this purpose, some effort was made to follow up on his request. Thus two individuals, Leo Bakker

and Ernest Pawlachuk actually attended the meeting and offered what amounted to evidence of Mr. Hyman's good character. As well, Mr. Sly testified that he was asked to go and invite a number of individuals to attend the meeting. Mr. LaPointe, who did observe the June 23rd incident and who had a view of it which was supportive to Mr. Hyman, testified that he was invited to attend but declined to do so as he did not wish to become involved. The invitation to Mr. LaPointe is important, inasmuch as it was apparently Mr. Hyman's view that the union had attempted to suppress evidence which was favourable to him. Thus, he had secured the preparation of a supportive letter from Mr. Massa and turned this over to one of the union officials. It would appear, however, that this letter was not read out at the second meeting and, indeed, none of the witnesses was able to provide a coherent explanation of what might have happened to that letter. The fact that the meeting was convened, however, and that witnesses favourable to Mr. Hyman's side of the dispute were invited, is, in my view, significant evidence of a good faith attempt on the part of the union to respond effectively to Mr. Hyman's complaint. As Jim King noted in his evidence, it is very unusual for the union to organize a meeting at which people are invited to come and present evidence relating to a grievance. Moreover, the time limits within which to pursue this grievance had long since passed and the willingness of the union to pursue the grievance and of the company to waive the time limits is some evidence of a good faith attempt to inquire seriously into whether a wrong had been done to Mr. Hyman.

The second meeting also ended inconclusively, however, and eventually, Mr. Hyman was invited to a meeting of the Executive Committee of the union to voice his complaints concerning the representation he had been receiving with respect to his grievance. At that meeting, it was resolved that another attempt should be made to secure a withdrawal of the letter of warning and, indeed, ultimately the union was successful in achieving this result at a meeting with company officials held on January 16th, 1978. Thus, whatever problems there might have been in the handling of this grievance in the early stages, the ultimate result was a favourable one. It must also be said that the result was favourable only after somewhat unusual and strenuous efforts were made by the union to achieve this result.

Although, as has been indicated, the respondent union concedes that the grievance was not well handled in the first instance, the respondent does not concede that the conduct of any of the shop stewards or of its own officials was motivated by attitudes of racial discrimination. In my view, the Commission and the complainant have not demonstrated, on the balance of probabilities, that the initial signing off of the grievance or the subsequent handling of it by the union was in any way motivated by attitudes of this kind.

The complainant remains disappointed with the outcome of the grievance process, in part because the result achieved by the union was that the letters of withdrawal relating to both LaPosta and Hyman were withdrawn. The rationale for withdrawing the letters

was that Hyman and LaPosta had not been represented by stewards at the time and this of course applied to both of them. As counsel for the Commission and the complainant argued, what Mr. Hyman was seeking from this process was not only a withdrawal of the letter of warning but a vindication of his position in the dispute with Mr. LaPosta. Thus, Mr. Hyman was frustrated by the fact that at the January 16th meeting, the merits of the dispute between the two men were not gone into and, in effect, no decision was made casting LaPosta in a negative light. While it is understandable that Mr. Hyman would seek this outcome, it is also understandable that the union might choose the easier course of relying on the technicality, as it were, of lack of representation as a basis for getting the letter withdrawn. It is also understandable that the union might see some advantage in getting both of its members relieved from discipline. Moreover, it would be understandable if the union, just as the company before it, was more inclined to find a solution to the problem which did not involve the difficult task of choosing between two men who had appeared at a meeting and vociferously stated opposite sides of a personal disagreement. Accordingly, although one can sympathize with Mr. Hyman's frustration in not achieving the outcome he desired, the fact that this did not occur is not in itself persuasive evidence of the existence of racial discrimination.

Assessment of the performance of trade union officials with respect to the January 16th meeting is complicated, however, by the fact that by the time that this meeting occurred, the complainant had become involved in further controversy. He had

allegedly failed to follow a direction to either make or pile boxes for TV Guides and, as a result, had been given a two-day suspension by the respondent employer. The suspension was the subject of a further grievance which was considered at the January 16th meeting and, ultimately the two-day suspension was reduced to one-day. We now turn to a consideration of this episode with a view to returning to a brief discussion of the settlement discussions of January 16th.

VI. The TV Guide Boxes Incident:

In late December, an incident occurred in which the complainant allegedly refused to follow the instructions of Mr. Ralph Sly, then serving as lead hand on the shift, and ultimately instructions to similar effect from Mr. DiRosa.

Mr. Sly, who issued the instructions giving rise to the dispute, testified that on the occasion in question Mr. Hyman was sitting on a stool, unoccupied, next to one of the machines. Nearby, two men, one of whom was Mr. Sly's son, were assembling boxes for TV Guides. Mr. Sly indicated that he asked Mr. Hyman to pile the boxes. According to Mr. Sly, he replied, "No. They're making the boxes. Let them pile them themselves". (Transcript, p. 1701) Mr. Sly indicated that he could not recall whether Mr. Hyman did actually go on to pile some of the boxes or not. It was Mr. Hyman's evidence that he did do so. According to Sly, if he did do so it was shortly thereafter that he came and complained that the other men were throwing boxes at him and refused, on this basis, to continue

the work. Thereupon, Mr. Sly went to report this fact to Mr. DiRosa, who assumed responsibility for the matter.

Mr. Sly explained in his evidence that leadhands, who are members of the bargaining unit, cannot exercise any management functions. Accordingly, if the instructions of the leadhand are not followed, the leadhand is simply to report the matter to his superiors and the latter will do whatever investigation they think is appropriate and take any measures they deem fit. Mr. Sly's view, then, was that he was simply following normal procedure in reporting an unwillingness to follow instructions. From Mr. Hyman's perspective, Mr. Sly was someone with whom he was already in some difficulty, given that his involvement in signing-off the grievance concerning the LaPosta incident had been the subject of a complaint to the President of the union and further, that Sly's involvement in the present episode was complicated by the fact that he was the father of one of the two men accused of wrongdoing by Mr. Hyman. With respect to the former point, Mr. Sly testified that it did not matter to him that this complaint had been made. Certainly, it is apparent that the criticism Mr. Sly received as a result of this complaint was meted out some months previously and, indeed, to Mr. King. With respect to the latter point, if his son was in fact engaged in wrongdoing to his knowledge, it would not likely be perceived by him to be in the best interest of his son to bring the incident to the attention of his superiors, as would necessarily be the case if he reported Mr. Hyman's unwillingness to accept the work assignment in question. It is not at all clear, then, that

Mr. Sly's actions were motivated by vindictiveness or by a parental conflict of interest.

Mr. DiRosa testified that when Sly advised him of this incident, he asked Mr. Sly to bring Hyman to his office. Mr. Hyman arrived in an angry state and said "another inquisition?" Mr. DiRosa testified that he made inquiries with the two men who were making the boxes and satisfied himself that they had not been throwing boxes at Mr. Hyman. Mr. Hyman suggested that he speak to another fellow worker, Ben Variano. Mr. DiRosa did so and found that Variano could not be of much assistance. This fact was indeed confirmed in Hyman's evidence; thus suggesting that even from Hyman's perspective, some investigation of the matter was undertaken by Mr. DiRosa. Mr. DiRosa further testified that, having satisfied himself that there was any reason not to do so, he ordered Hyman to go back to work on the boxes. Hyman protested, saying that it was dangerous to his health inasmuch as the others were throwing the boxes at his face. DiRosa informed Hyman that he would suspend him if he refused to follow his order. Hyman did not do and DiRosa thereafter imposed a two-day suspension. This disciplinary action was communicated to the complainant by Mr. DiRosa in a letter dated December 20th, 1977 (Exhibit 16).

According to Mr. Hyman's evidence, on the other hand, he never actually refused the work in question. Although his evidence on this point was not free from ambiguity, it appeared to be his position that while he had said that it was impossible

to work in these conditions or that he could not work in these conditions, he did not actually refuse to follow the instructions made by Mr. Sly. Mr. Hyman also offered a somewhat different version of the encounter in Mr. DiRosa's office. It was his evidence that it was Mr. Sly who suggested speaking with Mr. Variano. Further, it appeared to be his view that the suspension was imposed simply as a result of his alleged failure to follow Mr. Sly's instructions rather than any further instructions from Mr. DiRosa.

It is difficult reach confident conclusions with respect to an episode such as this in the face of conflicting evidence. As will be seen below, difficulties relating to Mr. Hyman's evidence concerning subsequent events has led this Board of Inquiry to view his evidence with great caution. Moreover, there does not appear to be any basis for a finding that Mr. DiRosa's evidence is in general unreliable and accordingly, where it necessary to do so, I would be inclined to prefer the evidence of Mr. DiRosa where his evidence is in conflict with that of Mr. Hyman. In the present instance, it is not necessary to do so, however, inasmuch as it is established on any version of this incident that Mr. DiRosa was confronted with statements by a leadhand that Mr. Hyman was refusing to follow instructions, he then investigated the matter and appears to have satisfied himself that Mr. Hyman was behaving improperly and, imposed a sanction. There is nothing in the record of these proceedings to suggest that Mr. DiRosa acted precipitately, that he failed to make appropriate inquiries or that he acted out of a sense of vindictiveness or on the basis of discriminatory motivations.

As has been mentioned, the suspension was the subject of a grievance (Exhibit 17) by Mr. Hyman. This grievance became the subject of discussion and ultimate resolution at the meeting of January 16th, 1978, to which attention must not be turned.

VII. The Settlement of January 16th, 1978:

The prelude to the January 16th meeting between the union officials and representatives of the respondent employer arising from the LaPosta incident has already been recounted. By the time of the meeting, the second grievance relating to the TV Guide boxes incident had also surfaced for consideration. Both of these items were placed on the table during this meeting by Mr. Bodkin and, according to Mr. Bodkin's evidence, a vigorous debate with representatives of the employer ensued. Ultimately, the respondent employer was prepared to agree to withdraw the letter of warning and reduce the two-day suspension to a one-day suspension. Mr. Bodkin, and other union representatives present, most of whom testified in these proceedings, felt that this was about as good an offer of settlement as they were going to get from the company. Indeed, they profess to have been rather pleased by what seemed, in the circumstances, to be a reasonably generous offer. This proposition was communicated to Mr. Hyman who indicated that he would also like to move from day shift back to afternoon shift in order to accommodate family babysitting arrangements. Mr. Bodkin testified that he then successfully obtained an agreement to this and that, after some discussion, Mr. Hyman agreed to the

proposed settlement.

Mr. Hyman maintains that, notwithstanding his acceptance of the terms of the settlement on January 16th, it was an unfair one. When asked in chief why this was so, he indicated that his principal concern was the manner in which the settlement was reached. First, he said that evidence which should have been used was not used. Secondly, he said that he was pressured into agreeing to the settlement because of his need to get off of the day shift.

With respect to the first point, the union's explanation, which I accept, is that there was no need to lead evidence concerning the LaPosta incident inasmuch as the employer was prepared to accept as a basis for withdrawal of the letter, the absence of representation. With respect to the second point, it may, of course, well be the case that Mr. Hyman felt that he had no effective alternative, given his alleged need to get off the day shift. Again, however, what must be demonstrated for the purposes of the present inquiry is that union officials, acting on the basis of discriminatory attitudes, applied pressure to Mr. Hyman which they would not have applied to the trade union members who were not black. There is simply no evidence of this in the present case.

Some considerable effort was made by counsel representing the complainant and the Commission to lead out evidence which would demonstrate that Mr. Sly is a man motivated by discriminatory attitudes with a view to establishing a basis for a finding, presumably, that the actions of either the respondent employer

or the respondent union relating to the LaPosta or the TV Guide boxes incident were affected by a bias of this kind. I am not satisfied that a case for this view has been established in the evidence. It is not unnecessary to review the evidence of Mr. Richards and Mr. Ramlalsingh in detail. The credibility of the latter witness was completely undermined on cross-examination. The evidence of the former relating to Mr. Sly concerned incidents which were ambiguous in nature. Thus, Mr. Richards felt that Mr. Sly teased him about his car because he, Sly, felt that a black man should not own a car of this kind. Yet, nothing of this kind was actually said and what was, according to Mr. Richards' evidence, actually said by Mr. Sly does not carry with it a necessary implication that he suffered from discriminatory attitudes. More importantly, it is Mr. Sly's evidence that he very strongly advocated the cause of a fellow employee named Wittington, a black employee who was, in Sly's view, wrongly dismissed by the respondent employer. According to the evidence, Wittington's work was rather slow in the early stages of his employment and he was dismissed on this basis. Sly successfully fought for his reinstatement and requested that he be assigned to Sly so that he might supervise him and, presumably, help him improve his work. I find evidence of this episode of some assistance in reaching the conclusion that the complainant and the Commission have not established that Mr. Sly, on the balance of probabilities, did, in his dealings with Mr. Hyman, act on the basis of discriminatory attitudes. More importantly for present purposes, there is nothing to suggest that officials responsible for making deci-

sions either within the respondent union or within the respondent employer had reason to believe that Mr. Sly acted on the basis of such attitudes and thus no basis whatsoever for suggesting that in making their decisions they tolerated or acted on the basis of what they knew to be discriminatory conduct on the part of one of their subordinates.

VIII. Baler Breakdown:

The chain of events leading ultimately to the complainant's dismissal began on the afternoon shift, on September 12th, 1978 with the breakdown of a baler, a device which, through suction, removes the waste paper created from the binding process. Mr. Herb O'Connor was on the scene and instructed the operators to disconnect the so-called "waste pipes" with the result that waste paper or shavings fell onto the floor. The operator on one of the machines, Allan Chiswell, indicated to Mr. O'Connor that he needed someone to clear the waste away from the floor and put it in boxes so that he could continue to operate his machine. Mr. O'Connor testified and, indeed, recorded in a memorandum written on September 12th (Exhibit 80) that he then approached the area where a number of porters were working. Mr. Hyman was the first he came to and he instructed Hyman to go and assist Chiswell. A few minutes later Chiswell reported to O'Connor that Hyman refused to pick up the waste paper. O'Connor then approached Hyman and had a conversation with him which is the subject of dispute and which ultimately resulted in the imposition of a three-day suspension on Mr. Hyman by Mr. O'Connor.

The substance of the dispute between the parties relating to this incident relates to the significance of a medical condition which Hyman has alleged to have had at this time, a boil located in his groin or on his leg which allegedly made it difficult for him to pick up the waste. Thus, considerable attention has been paid in the evidence and in argument to the question of whether the boil was mentioned as the exclusive or principal reason for refusing the work or rather, as an afterthought by Mr. Hyman. As well, the difficulty of the job and the extent to which Mr. Hyman had been engaged in bending and lifting up to this point in time has been examined. Further, one of the reasons indicated by Mr. O'Connor in his letter communicating to Mr. Hyman the decision to impose a three-day suspension (Exhibit 19) is that when Mr. O'Connor questioned Mr. Hyman about his unwillingness to do this job, Hyman's language "became very abusive and profane". The manner in which Mr. Hyman spoke to Mr. O'Connor has therefore also been the subject of much evidence and discussion.

With respect to the question of the importance of Mr. Hyman's medical condition as a basis for refusing the work assignment, it is interesting to compare two different versions of this episode recounted by Mr. Hyman in his evidence-in-chief and in cross-examination. In-chief, Mr. Hyman stated the following (Transcript pp. 324-326):

Question: The baler system broke down?

Answer: Yes. After the system broke down the machine operator paused for couple of minutes. He paused for a couple of minutes and then he start to run the machine again. Then a couple maintenance guy came over and start to gather the waste, the trimmings into a big box that they call a bin. Now during this process the operator whose name is Allan told me I should go on the floor and pick up the garbage, the waste and help load it in the bin. I then told him - I turn to him verbally and said to him, "listen, you are not my boss. I have been told to come over here and work by Rueben Earle. You don't give me no orders." He went right away and he went for Mr. O'Connor. Mr. O'Connor came down and I went to Mr. O'Connor and told him, "you know what is the problem?" He came to find out the problem so I meet him part of the way and tell him what was going on. Mr. O'Connor then turned to me and said "go back to work, you black fucker, or punch out and go home" in a low tone of voice. I then says to Mr. O'Connor, "not like that". I says "I am a senior porter here and I never refused from what you told me to do. Why should I go and pick up garbage, the waste off the floor when I am a senior man and this guy is not even experienced enough what he is doing?" He told me to pick up the garbage or go home. I didn't concentrate further by letting him know I wouldn't mind picking up the garbage if I was in the proper health. At that time I had a boil on the groin and if I bend too low excessively I would be in alot of pain. I didn't explain to him the reason why I am unable to pick the garbage up. He then told me, "either pick the garbage up or go home". I tell him "not like that. If you want me to go home you call the shop steward and explain to the shop steward or I will do the explanation and then if the shop steward told me I should go home I will go home". He sent another porter to call Ray King. A few minutes later Ray King came and I told Ray King what was going on. Ray King told me he understand, but O'Connor is the plant superintendent and if he tell me to do a job and if I refuse from doing it then he can't tell me to stay. I should go home and produce a doctor's certificate to verify that I got a boil. He told me I should go home and go to my doctor and bring back a certificate to make certain that I was in pain. I did so. I did so

It should be noted that in this passage, Mr. Hyman stresses that he did not communicate to Mr. O'Connor about his medical problem, at least not prior to the arrival of Mr. King. If the incident occurred as Mr. Hyman alleges in this passage, it would not be at all surprising for Mr. O'Connor to conclude that Hyman was refusing work because he felt it beneath his dignity and, on this point, it should be noted that cleaning up tasks of various tasks are, according to all witnesses who addressed the question, a work assignment commonly given to porters. On cross-examination, Mr. Hyman provided the following account (Transcript pp. 650-651):

Question: Isn't it true, Mr. Hyman, that when he first asked you to do the job, your first excuse was, "Why should I pick it up when there are junior men available?"

Answer: That's not true.

Question: That's not true?

Answer: No, that's not true. If I make such statement, its a mis-statement. I never recall properly. That wasn't the first - that wasn't the first -

Question: Well, he told you you had better obey order or go home?

Answer: Yeah, he told me that.

Question: And then you mentioned your boil?

Answer: No, no, no. I mentioned the boil before we get to that.

Question: Which did you mention first; the boil or the fact there were junior people?

Answer: No, no, no. I mentioned the boil. I tried to explain to him that I have a boil and I can't go that low.

He turned to me and tell me that I won't argue with him; "Go back and work, you black fucker".

Question: Mm-hmm.

Answer: And then he walked away from me.

Then I start to argue with him and tell him that there is - I am a senior and there is juniors there that is incapable of doing what I am doing which is more important than picking up the scrap.

Mr. O'Connor's account of the conversation is much more consistent with Mr. Hyman's first version, inasmuch as it stresses that the boil was not the first excuse offered by Mr. Hyman. O'Connor alleges that Hyman began by complaining that he was given this assignment as an act of discrimination and that he was sick and tired of being pushed around and moved from job to job in this way. It was Mr. O'Connor's recollection that it was he, O'Connor who insisted on involving a union steward as he realized that a confrontation was about to occur. Other witnesses who were in the vicinity of this exchange have offered evidence generally supportive of Mr. O'Connor's version of this incident. Trudy Coram, a forelady, on the afternoon shift overheard a portion of this conversation. Her evidence was, in part, as follows: (Transcript pp. 2154-2157)

Question: Can you tell how it was that Mr. Hyman and Mr. O'Connor came to be together?

Answer: We had a breakdown on our baler and Mr. O'Connor shut down the machine we were running at that time and ran this other machine instead. The baler was down longer than he anticipated so they had to put the waste onto the floor in order to run the machines. So with that Mr. O'Connor approached Walter and asked him would he pick up the shavings off the floor?

Question: Just stopping you there, how do you know he made that request of Mr. Hyman?

Answer: Because he came down to the machine and asked Walter and as they were walking, he came closer to where I was working and they started, Mr. Hyman started yelling at Mr. O'Connor.

Question: Let me just stop you there. When you first heard them speaking to each other, I recognize you said yelling, but speaking, how far away from them were you?

Answer: About 10 feet.

Question: How much of the conversation that went on between them did you hear?

Answer: Well, first I didn't hear too much. They started yelling.

Question: Who started yelling?

Answer: Walter.

Question: Yes?

Answer: They came a little closer and he said no, he was not going to.

Question: Just let me stop you there. What was the first thing you remember hearing when the two of them were together?

Answer: Just that Mr. O'Connor asked Walter to please pick up the shavings off the floor.

Question: Yes?

Answer: And Walter said no.

Question: When did the yelling come?

Answer: Well he started yelling then and he said to him, "no, you are discriminating against me. It's because my fucking skin is black and he started pointing at his arm at the same time.

Question: Who was it that said that?

Answer: Walter Hyman.

Question: How did Mr. O'Connor react to that allegation?

Answer: He just very calmly told him that was the job he was giving him to do and if he did not want to do the job that he had assigned, that he would suggest he punch his card and go home.

Question: What did you hear Mr. Hyman say to that?

Answer: I heard him say, "If you want my card punched, you punch the fucking card".

Question: And what?

Answer: And "you punch the fucking card".

Question: How did Mr. O'Connor react to that?

Answer: With that he left and went and got Ray King, who was the shop steward.

Question: Just stopping you there, I know you recounted the conversation for us, how long did the two of them, O'Connor and Hyman stay talking together?

Answer: Approximately 10 minutes.

Question: You referred to some swearing there, what would you tell us was the nature of Mr. Hyman's comments as you heard them besides that with respect to swearing?

Answer: He was swearing throughout the whole conversation.

Question: What about Mr. O'Connor?

Answer: No, I didn't hear him swear at all.

At O'Connor's request, Coram signed Exhibit 80 stating that the attached letter is a correct account of the conversation between O'Connor and Hyman. Allan Chiswell, who also signed Exhibit 80 in this fashion, testified and offered evidence similarly supportive of Mr. O'Connor's account of this incident.

Given the inconsistency of Mr. Hyman's testimony and the absence of any basis for undermining the credibility of witnesses

Coram and Chiswell, I conclude, the O'Connor version of the incident is essentially correct, including his denial of using racial language, and that the evidence of the complainant, including the passages quoted above, is misleading in a number of material respects. Thus, for example, Mr. Hyman denied that he used profane language in his conversation or that he accused O'Connor of discriminating and suggested that he yelled at him only once.

With respect to the difficulty of the work Mr. Hyman had been undertaking earlier that day, it was Mr. O'Connor's evidence that his portering work would have involved lifting bundles, approximately 35 pounds in weight, from the skid to the bunn-ty machine and back again and that when the skid was emptied this would involve placing packages very close to floor level. This, together with the fact that Mr. Hyman made no attempt to pick up the waste to see whether or not it would be too painful an exercise, together with the fact that the boil was mentioned as an apparent afterthought by Mr. Hyman led Mr. O'Connor to view the alleged medical excuse with considerable skepticism and, on the basis of the evidence before this Board of Inquiry, that view appears to be quite defensible.

Additionally, it was Mr. O'Connor's view that the abusive and profane fashion in which Mr. Hyman conducted the conversation was itself grounds for discipline and, again, the evidence before this Board of Inquiry suggests that this is an opinion that could be held by a reasonable person free of attitudes of racial discrimination.

When Mr. King arrived on the scene, he advised Mr. Hyman that if he did refuse the assignment and left work, he should obtain some medical evidence with respect to his condition. This Mr. Hyman did. Eventually, when he returned to work after the three-day suspension had expired, he brought with him a certificate (Exhibit 20) from his personal physician, Dr. C.C.L. Nongauza, indicating concisely that Mr. Hyman had been under his care as of the 13th of September and may return to work on the 14th, "light duties for a time". Mr. Hyman grieved the three-day suspension and this grievance is one of the two ultimately submitted to arbitration by the respondent union.

The three-day suspension, effective September 14, 15 and 18th was communicated to Mr. Hyman by a letter (Exhibit 19) from Mr. O'Connor dated September 14th, 1978. The letter directs that subsequent to the suspension, Hyman "will be required to report for work on the day shift Tuesday, September 19th, 1978 at 7:45 a.m.". The reason for a move to the day shift was explained by Mr. DiRosa upon two grounds. First, the porters receive closer supervision on the day shift and this was thought to be necessary in Hyman's case. Secondly, DiRosa testified that Mr. O'Connor was badly shaken up by the encounter he had with Mr. Hyman on September 12th.

IX. "Light Duties" and Dismissal:

When Mr. Hyman returned to work on September 19th, the respondent employer was faced with the task of finding a job involving "light duties" which Mr. Hyman could undertake or, if no

such job was available, giving him the option of continuing at his regular work or staying home from work on the ground that he was not medically fit to do his regular work. The evidence indicates that there were in fact no jobs involving light duties in the bindery. Mr. Ray King, the shop steward who filed the Hyman grievance concerning the baler incident, suggested to Mr. DiRosa that it might be possible for Mr. Hyman to replace Mr. Goss, then starting two weeks of holidays. Mr. Goss' job, as a member of the maintenance crew, was cleaning the washrooms in the plant. Mr. King, having done this job himself on previous occasions, was of the view that it was not very burdensome work and that this would enable Mr. Hyman to continue working, notwithstanding his ailment. Mr. DiRosa agreed to the suggestion and this possibility was suggested to Mr. Hyman.

Although Hyman agreed to undertake this work assignment, it was evident that he was not pleased to do so. Hyman described the assignment in his cross-examination as a "demoting situation and an insult". Eventually, as has previously mentioned, Mr. Hyman grieved this assignment, describing it as a "demotion".

On September 20th, Mr. Hyman sought medical evidence which would, as he saw it, facilitate a return to normal duties. He visited Dr. Nongauza who provided a further certificate (Exhibit 21) stating that Mr. Hyman could return to normal duties. Further, although Mr. Hyman denies that this occurred, Dr. Stecyk, the

doctor retained by respondent employer to provide medical services to its employees, having learned that Hyman had returned to work with a requirement of light duties, called him in for an examination. Dr. Stecyk's evidence with respect to this meeting with Hyman was to the effect that Hyman indicated that he had recovered from the boil and that therefore there was no need for Dr. Stecyk to conduct an examination of him. Dr. Stecyk prepared a letter (Exhibit 41) to Jean Montford, of the respondent employer's personnel office recounting these facts. It is not entirely clear from the evidence of any witness when it was that Hyman first protested either to King or to the foreman, Mr. Earle or to Mr. DiRosa that inasmuch as he was fit to return to normal work he should be re-assigned to regular portering duties. Mr. DiRosa testified that he learned that Hyman was fit for regular duties during the second week of his work on the washroom job but that he insisted that Hyman should finish out the week as there was no one else to take on the job. Mr. King testified that he had "heard" that Hyman brought back a certificate that he could do his regular job but that this would not help because they had agreed with the employer that Hyman would undertake this assignment for a two-week period.

King further testified that Hyman informed him that Mr. Goss had returned and was working in the skid room making skids. Although the question of whether or not Mr. Goss did in fact return during this period was a matter of considerable debate among the parties, Mr. King appeared to have a clear recollection of conversation with Mr. Goss in which he, Goss, indicated that he returned

earlier than planned. Against this background, King approached Mr. Earle to get an explanation for this. Mr. King professed to be unable, however, to remember what explanation Earle offered but, as this was the second last day of the second week of the assignment, Mr. King advised Hyman that he would have only one more day of washroom duty to serve.

At some point during this two-week period Mr. Hyman began to complain that he was suffering an allergenic reaction to the chemicals he was required to use for the cleaning work. No mention of this problem was made to either Dr. Nongauza or Dr. Stecyk on the 20th. However, it was mentioned to the company nurse, Nancy Greene, on September 28th. Hyman complained that he was suffering from itchy skin and had a visible irritation and rash on his hands and arms and cracked skin. As well, he maintained that he was coughing black phlegm as a result of inhaling the cleaning chemicals. Nurse Greene testified that she could not see any evidence of skin irritation and further, that she suggested to Hyman that his smoking might be the cause of the phlegm. These medical complaints came to the attention of foreman Earle who, together with Mr. DiRosa requested that Hyman visit Dr. Stecyk on the 28th. Though this may have been the first occasion in which management became aware of this alleged problem, Mr. King did testify that Hyman had refused a previous invitation to visit a doctor with respect to this problem. The purpose of the visit was to obtain an opinion as to whether or not he did have a medical excuse for being relieved of the washroom assignment. An appointment was made for 11:00 a.m. and until he left for the doctor's

appointment, Hyman was asked to work in the skid room. Mr. Earle .
drove Mr. Hyman to Stecyk's office for the 11:00 a.m. appointment.

After conducting an examination of Mr. Hyman, Stecyk concluded that he was not suffering an allergenic reaction. A confirming letter was forwarded to the respondent employer's personnel office by Dr. Stecyk on October 2nd, 1978 (Exhibit 31).

Upon their return to the plant, Mr. Earle informed Mr. DiRosa that Stecyk had not detected any problem and it was determined that Hyman should return to washroom duty for the remaining half hour or so of the day shift. It is the respondent employer's position that Mr. Earle issued this instruction to Mr. Hyman and that the latter refused to follow it. Mr. King testified that Mr. Hyman indicated to him that foreman Earle had said either go back to the washrooms or go home and that he, Hyman, proposed to do the latter. King asked Hyman whether it was not the case that Earle had indicated that if he did go home that that would result in termination. Hyman replied that that was not his understanding. King advised him that if he did go home he had better make sure that he got some medical evidence of the problem.

Hyman's evidence which, in all of the circumstances, appears to be disingenuous, was that he followed this "order" of King's to go home, only to find that when he returned to the plant next day he had been dismissed. On cross-examination, he conceded that when approached by Mr. Earle and instructed to return to washroom duty, he remarked that he would take no more of this "bull-shit".

Although the evidence concerning this final chapter in Mr. Hyman's career at Southam Murray is far from clear, it would appear that the employer's officials had a reasonable basis for understanding that Mr. Hyman, in circumstances where his credibility had been substantially undermined, refused to follow the instructions of his foreman. Given the company's view of the previous episodes in which Mr. Hyman refused work assignments, it is not possible to conclude that the evidence before this Board of Inquiry establishes, on the balance of probabilities, that the dismissal was motivated by racial discrimination.

X. The Grievance Arbitration:

The complainant grieved his September 29th dismissal and this grievance, together with the grievance concerning the baler incident, was submitted to arbitration. A constituent element in Mr. Hyman's Human Rights Code complaint against the respondent union is that it did not properly represent him in this arbitration proceeding.

The union was represented in this matter by Mr. Ken Petryshen. The principal complaint made by Mr. Hyman with respect to Mr. Petryshen's efforts were that he did not delve sufficiently into the history of what Mr. Hyman viewed as discriminatory conduct on the part of company officials in the arbitration hearing. It would appear that he seemed that it would be helpful to his case to have the circumstances surrounding the LaPosta incident and the baler breakdown incident brought before the Board of Arbitration.

Mr. Petryshen testified before this Board of Inquiry and gave a full account of the thinking behind his decision not to go into such matters. It was his view that the Board would simply not be willing to entertain evidence concerning these matters, inasmuch as they were the subject matter of prior grievances which had been settled. As Mr. Wray suggested in argument that Mr. Petryshen appears to have been on sound ground in reaching this opinion. Reference was made to the discussion in Brown and Beatt Canadian Labour Arbitration (1977), at p. 373 in which it is stated that generally employees will not be allowed to produce evidence to explain away prior misconduct where the grievor has accepted the discipline or where the grievance was not processed through to arbitration. Although I express no opinion on the merits of this view or on the question of whether in a case of alleged discrimination, it might be possible to review circumstances concerning even settled grievances where discrimination was alleged to play a factor, I am satisfied that Mr. Petryshen genuinely held the view that evidence concerning prior matters would have been ruled inadmissible. As well, I am satisfied that Mr. Petryshen communicated this view to Mr. Hyman prior to the arbitration hearing.

Mr. Bodkin's evidence concerning his instructions to Mr. Petryshen was that he simply instructed Mr. Petryshen to win the case. Mr. Petryshen confirmed this and indicated that he believed that Mr. Bodkin very much wished to win the arbitration inasmuch as this would very likely result in the abandonment of

Mr. Hyman's human rights complaints against the union.

On the evidence before this Board of Inquiry, I am satisfied that no basis has been laid to support the allegation that the union did not vigourously pursue the arbitration of the two grievances in question on Mr. Hyman's behalf.

XI. The Intimidation Issue:

As has been previously mentioned, the complaints against both respondents include an allegation that prejudicial conduct occurring after July 19th, 1977 results from the fact that the complainant had lodged complaints against each respondent. It is unnecessary to review in these reasons for decision, each of the instances of disciplinary action or union response thereto which fall into this category against the background of this allegation. The foregoing discussion of these events indicates that plausible explanations for the actions in question have been brought forward in evidence by both respondents. Those explanations are unrelated to racial discrimination and they are also unrelated to a suggestion of harrassment because of the complainant's earlier complaints.

There is, however, one further incident which requires some consideration in the light of this allegation. Shortly after the filing of the first complaint against the union (Exhibit 4), Mr. Bodkin called Mr. Hyman into his office and expressed his disappointment with this occurrence in angry and profane terms. Although in

the second complaint against the union the complainant states that Mr. Bodkin called Hyman by "obscene and racial names", Mr. Hyman did not allege in his evidence-in-chief that racial language was used. Mr. Bodkin himself testified that on this occasion he called Hyman "a little prick or fucker" and asked him "what do you want?"

Mr. Bodkin's explanation for this outburst was that he felt he had done quite a lot to help Mr. Hyman and was therefore angered by the suggestion that he and the union had discriminated against him. The re-opening of a settled grievance was an unusual procedure, as was the convening of a series of meetings with union officials about a matter such as a letter of warning. Mr. Bodkin felt that the outcome the union had achieved was a very good one in all of the circumstances. As Mr. Hyman himself indicated in his evidence, Hyman thanked Bodkin for all of his efforts on Hyman's behalf after the settlement was negotiated on January 16th, 1978. Against this background, it was Bodkin's perception that Hyman's accusation of prejudice was most unfair.

The evidence of both Hyman and Bodkin suggests that this is all that there was to this exchange. No threats of any kind were made on this occasion by Mr. Bodkin. Nor did Mr. Hyman suggest that as a result of this conversation he believed that prejudicial consequences of any kind were being threatened by Mr. Bodkin with a view to pressuring Hyman into withdrawing his complaint.

The question which arises then is whether an outburst of this kind constitutes prohibited conduct under Section 5 of the Ontario Human Rights Code. That section provides as follows:

"No person shall,

- (a) refuse to employ or to continue to employ any persons;
- (b) threaten to dismiss or threaten to penalize in any other way any person in regard to his employment or any term or condition thereof;
- (c) discriminate against any person in regard to his employment or any term or condition thereof; or
- (d) intimidate or coerce or impose any pecuniary or other penalty upon any person,

on the ground that such a person,

- (e) has made or may make a complaint under this Act;
- (f) has made or may make a disclosure concerning the matter complained of;
- (g) has testified or may testify under this Act; or
- (h) has participated or may participate in any other way in a proceeding under this Act.

Counsel for the complainant and Commission argue that Bodkin's conduct constitutes intimidation within the meaning of subparagraph (d) of this section. In my view, however, this is to give too broad a reading of the concept of "intimidation" in this statutory context. To be sure, the concept of intimidation in common parlance may include virtually any situation in which the conduct of one person causes another to sense some fear or anxiety. The term is

not uncommonly used in a narrower sense, however, to refer to situations in which one person uses threats of some kind to induce another to engage in or refrain from some activity. When one reads section 5 in its totality, it appears to be the legislator's intent that some prejudicial consequence must be either imposed or threatened if the conduct is to constitute a contravention of section 5. I would be reluctant to give so broad a reading to section 5 as to bring any angry remark within its sweep.

XII. Costs:

For the foregoing reasons, the complaints lodged by the complainant against the respondent employer and the respondent union will be dismissed by this Board of Inquiry. Counsel for the respondents and, more particularly, counsel for the respondent employer, have submitted that in such eventuality, the parties should be entitled to an award of costs sustained by them in these proceedings to be payable by the Commission. Counsel for the respondent employer argued that the entire proceeding was frivolous and vexatious and that the investigation of these matters by the Commission must have been grossly inadequate. Counsel noted that some portion of the complainant's concerns with respect to the employer's conduct had previously been the subject of adjudication in a grievance arbitration and that in that proceeding, the Board of Arbitration had ruled that it did not find the evidence of the complainant credible with respect to inci-

dents which were also the subject matter of dispute before the present Board of Inquiry.

It has not been clearly determined in previous tribunal or judicial decisions, whether Boards of Inquiry appointed under the Ontario Human Rights Code, prior to recent statutory amendments, have the power to make such awards. I am satisfied, however, that in any event this is not an appropriate case in which to do so. It is true that this Board has concluded that the evidence of the complainant is unreliable in material respects. In addition to the difficulties recounted in these reasons, a number of other inconsistencies and conflicts with the evidence of other credible witnesses could be listed, as they were in the submissions made by counsel for the respondents. I am not satisfied, however, that the complainant is completely insincere in his belief that he has been unjustly treated by both the respondent employer and the respondent union and that this treatment was motivated, in part at least, by discriminatory attitudes. In this sense, I am persuaded that the proceedings are not frivolous or vexatious from the point of view of the complainant.

As far as the Commission's role in proceeding with these complaints is concerned, there has been no evidence before this Board of Inquiry concerning the manner in which the Commission discharged its responsibility to investigate these complaints. I am reluctant to conclude, therefore, that the Commission discharged its responsibilities in an unsatisfactory manner.


In the absence of evidence that the complainant has brought forward a complaint in bad faith or frivolously and in the absence of evidence that the Commission has discharged its mandate irresponsibly, it is my view that it would inappropriate to make an award of costs. I draw some support for this view from the nature of the discretion to impose costs conferred in the amendments to the Code first enacted in 1981 which are, however, inapplicable to these proceedings. See 1981, S.O., c. 53, sec. 40(6).

Counsel for the respondents also sought their costs for the hearing on a particular day on which an adjournment was made necessary by virtue of the fact that witnesses either subpoenaed at the request of counsel for the complainant and the Commission or invited to attend by them, were not in attendance. In the absence of any evidence that counsel for the Commission and complainant did not diligently attempt to secure their attendance and in the light of other delays resulting from problems encountered by counsel for the respondents, it is my view that an award of this kind would be inappropriate in this case.

XIII. Conclusion:

It follows from the foregoing discussion that the various allegations and complaints made against both the respondent employer and respondent union have not been substantiated, on the balance of probabilities, by the evidence brought before this Board of Inquiry. Accordingly, the complaints are hereby dismissed.

DATED AT TORONTO, this 21st day of June, 1984.


Board of Inquiry.

